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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-[illegible]

JOSEPH TREMARCO,

Petitioner,

—v—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1972

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THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement and Synopsis of Previous Proceedings

Petitioner alleges that he is seeking a writ of certiorari to review "the judgment of the Court of Appeals for the State of New York" entered June 29, 1972. However, petitioner's application for leave to appeal to the Court of Appeals of the State of New York was denied June 29, 1972. The highest appellate court which heard this case, and affirmed the conviction, was the Supreme Court of the State of New York, Appellate Division, Second Department. The affirmance was without opinion, the order being entered May 30, 1972.

The petitioner was convicted on December 17, 1971, after a trial by jury, of the crimes of Attempted Murder, Assault in the First Degree, and Possession of a Dangerous Weapon, a felony. Petitioner was sentenced to be committed to the

New York State Department of Correctional Service for a maximum of twenty-five years on the Attempted Murder, a maximum of ten years on the Assault in the First Degree, and a maximum of four years on the Possession of a Weapon, all sentences to run concurrently.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to the provisions of 28 USC 1254(1) and 28 USC 1257(3). Your respondents note that 28 USC 1254(1) is inapplicable in that it deals with petitions to review decisions of federal courts of appeals. The jurisdiction of this Court is properly sought under 28 USC 1257(3) in that petitioner is claiming that the rights, privileges and immunities afforded him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution have been abridged.

History of the Case

By Kings County Indictment No. 2164/1971, the petitioner was charged with the crimes of Attempted Murder, Assault in the First Degree, and Possession of a Weapon as a felony. The charges all arose from the machine gun assault committed upon one Harry Bogin on March 11, 1971.

The petitioner was tried before a jury, the trial commencing on September 15, 1971, and continuing until a verdict of guilty was rendered on September 28, 1971.

Sentence was imposed on December 17, 1971. The conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department, on May 30, 1972. Leave to appeal to the Court of Appeals of the State of New York was denied on June 29, 1972.

Statement of Facts

The Wade Hearing

Prior to trial, petitioner sought a "*Wade*-type" hearing. The evidence adduced at the hearing is summarized as follows:

HARRY BOGIN lives at 2783 Brighton 8th Street, Brooklyn. On March 11, 1970, he arose at approximately 6:30 or 6:45 (A37)* and left his house at about 7:00 or 7:10 a.m. (A38). He started to walk across the street to where his company truck was parked. It had a flat tire (A38). As he started to walk towards the back of the truck, he saw "a gentlemen who I recognized" carrying a gun (A39). Bogin recognized the man "as soon as he came out of the car" (A39). Bogin shouted "No," started to run and heard gun fire. The next thing he knew, he was across the street, lying on the ground (A40).

Bogin saw the man in "a full view of his face" for "no more than a second" (A40). He recognized the man from Federal Court in New Jersey (A40). Bogin first saw this man when his name was called by the Federal Court (A42), as he and the man were co-defendants in a case in that court (A43). The name of the man is Joseph Tremarco (A43). While in Federal Court, Bogin looked at Tremarco as he, Tremarco, was returning from the bench and walking out of the courtroom (A44).

Later, after Bogin was called before the court, he went into a fingerprint and "mug shot" room. Several people

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* References are to the Petitioner's appendix, submitted on the appeal to the Supreme Court of the State of New York, Appellate Division, Second Department.

were there, among them Tremarco (A45). During this time, Tremarco was sitting on a couch, and Bogin was near the door, approximately ten or twelve feet away (A45-46). Possibly ten or fifteen minutes elapsed, during which Bogin looked at Tremarco (A46). Later, Bogin was sitting on the couch and Tremarco was sitting in a chair. Again, Bogin had occasion to look at Tremarco (A46).

Still later, as Tremarco was being photographed, Bogin looked at him full face (A46). The two men were in the room about twenty minutes to one-half of an hour (A47). The lighting conditions in the room were "a little bit better" than in the New York Supreme Court courtroom (A47).

On March 12, 1971, Bogin was in Coney Island Hospital. Assistant District Attorney Davenport came in and said that he was bringing in someone for Bogin to look at (A48). Two people then came in with Tremarco. After they walked out, Bogin said that "that was the man that shot me" (A48).

Bogin also recalled that Agent Collins had shown him photos of many people, about four or five of which he recognized (A48-49). Of that group, Bogin recognized Tremarco (A49).

After being shot, Bogin crawled into his house and collapsed on the kitchen floor. He told his wife to call an ambulance and the FBI. He also told his wife he had been shot by Tremarco (A49). Bogin also had a conversation with a New York City policeman, but his recollection of this was vague, due to his condition (A49). He thought he told the officer that Tremarco shot him (A50).

On cross-examination, Mr. Bogin again stated that he saw a man coming towards him from the rear of a car

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On cross-examination, Mr. Bogin again stated that he saw a man coming towards him from the rear of a car

(A61). He recognized the gun held by this man as a submachine gun (A62). Mr. Bogin has 20/20 vision, his last eye examination having taken place a year or two previous (A63).

The court appearance at which Bogin had seen Tremarco took place at the end of 1969 or early 1970 (A64) or at the end of 1970 or early 1971 (A112).

After being shot, Bogin made his way back to his house "with a full head of steam" (A77). He told his wife to call the FBI, and an ambulance, and that "Tremarco had shot me" (A78). The name Tremarco "flared" in Bogin's mind when he first saw him (A79).

When shown photographs at the hospital, Bogin picked Tremarco, and another man who resembled him. The second man was also named Tremarco (A90). Tremarco was brought into Bogin's hospital room; he was handcuffed at this time (A93). When Tremarco was brought in, Bogin fully expected the man who was brought was the man who shot him because he "had identified this person pretty fully" (A99).

Harry Bogin identified the appellant, in court, as the man who had shot him (A113).

RAYMOND A. BROWN was called as a witness for the petitioner (A122). Mr. Brown is a New Jersey attorney, familiar with criminal cases (A123). On March 12, 1971, at approximately 8:00 a.m., Mr. Brown was informed by one Myron Mauer that the appellant had been arrested (A124). The Federal Magistrate in Newark told Brown that Tremarco was to be arraigned on a federal obstruction of justice charge in Brooklyn (A125-126). Mr. Brown

went to Brooklyn where he encountered Assistant District Attorney Davenport, who informed him that Tremarco would be booked on the Kings County charges and that no attempts would be undertaken to secure statements or place the petitioner in a lineup (A132). Mr. Brown then left Brooklyn to return to Newark (A133).

GERALD COLLINS of the Federal Bureau of Investigation was called as a witness for the People (A134). He picked up Tremarco in Newark on March 12, 1971, and took him to the Federal Court in Brooklyn for arraignment on an obstruction of justice charge (A134). Previously, he had spoken with Harry Bogin who had told him that Joseph Tremarco had shot him (A135). He had shown Bogin 48 photographs and, for the group, Bogin selected Tremarco (A136). He also selected a photograph of Tremarco's brother and stated "I can't be sure. I think I have seen this man before" (A137).

As to the obstruction of justice charge, it was presented to a federal grand jury but no indictment had been voted by the day of Mr. Collins' testimony, September 16, 1971 (A140).

After his federal arraignment, Tremarco was released in his own recognizance and was immediately taken into custody by New York City police officers (A159).

Bogin selected Tremarco's photograph, without hesitation, as the individual who shot him (160). He also selected the photos of Dominic Tremarco and Hugo Ernest Colosanti and stated that he may have seen them in the past (A161). When selecting appellant's photograph, however, Bogin stated "That's him, that's the one" or words to that effect (A164).

PATROLMAN RAYMOND BINI testified that, while on duty on March 11, 1971, he had occasion to go to 2883 Brighton Eighth Street, Brooklyn (A173). He proceeded to the upstairs apartment where he was told by an injured man that he had been shot by a man named "John Tremarco" (A174).

MARK MARTIN STEINBERG testified that he lives at 2798 Brighton Eighth Street, Brooklyn. On March 11, 1971, while getting dressed, he heard "rapid fire noise" (A182). Upon looking out of the window, he saw Harry Bogin running from the street towards his (Bogin's) house (A183). Steinberg went to his neighbor's house. Bogin told him he had been shot by a man "who hit the FBI officer in a case he was involved with previously" (A184). He said the man was "Joe Tommico, Timco, Temarco" (A185). Bogin said "Tremarco" while on the kitchen floor (A193).

At the time Steinberg heard the firing noises, it was light out, on a clear morning, with no fog, smoke or haze (A189).

EDWARD JOHN BOYD V, called as a witness for petitioner, is an Assistant United States Attorney and testified that he is the prosecutor in charge of a federal case against Joseph Tremarco (A220). Boyd's information that it was Tremarco who had shot Bogin came from Detective Nacht (A224). Boyd was told that Tremarco was to be arraigned in Brooklyn, because no magistrate was sitting in Newark (A231). Under the circumstances of this case, the crowded detention facilities and the fact that local officers were to arrest Tremarco immediately, it was not unusual to release Tremarco without bail being posted (A234).

DETECTIVE IRWIN NACHT was called as a witness for the People. He is the officer charged with the responsibility of investigating the shooting of Harry Bogin (A246). Upon

inquiring of Bogin as to who had shot him, Nacht was informed "John Tremarco. I got locked up with him in a Jersey case" (A243).

The first officer on the scene, Patrolman Bini, had filed a report stating "an unknown person did shoot with a, gun causing serious injury" (A252).

Detective Nacht accompanied Tremarco into Bogin's hospital room. Bogin said nothing. After leaving the room, Nacht learned Bogin had stated "that's the man" (A285). Bogin told Nacht that he had seen Tremarco previously when he was being "booked" or "arrested" (A288).

HARRY BOGIN was recalled (A311). He confirmed that his appearance in New Jersey Federal Court was in late 1970 or early 1971 (A311).

The Court ruled as follows on the motion to suppress the photograph identification and showup:

> "The Court finds under these circumstances, the identification was suggestive and violative of his constitutional rights.
>
> The exhibition of the photographs, in my opinion, constitutes a line-up. Mr. Brown's presence was required in accordance with the due process clause of the Constitution, and the failure of Mr. Brown to be present comes within People v. Wade. (sic)
>
> The Court finds that the identification at the hospital, both of the photographs and of the confrontation, is tainted and will be suppressed." (A330)

Petitioner then moved to suppress any in-court identification as being tainted by the photograph identification and the showup. This the Court quite resoundingly refused to

do, stating that as to a taint, "[t]he Court is in complete disagreement with you (Mr. Gillen) on that account" (A330). The court stated further:

> "You can't get around one thing that Harry Bogin testified that he was a co-defendant with Mr. Tremarco in Newark, that he was in his company approximately three months prior to March 11, 1971, and that when the name of Tremarco was called out as a co-defendant he noticed him, and that subsequently they went downstairs to a room so that they could be photographed and possibly fingerprinted, and he was in his company at least a half hour. I think his testimony was twenty minutes or thirty minutes or forty minutes, something like that. So that he had time to look at him, to study him. This wasn't a casual acquaintance, this was a person who was a co-defendant in the case.
>
> Subsequent to that, Mr. Bogin testified before me in this hearing that when he put his foot on that sidewalk and looked up, and he saw a man with a machine gun in his hands, he yelled out, 'Oh, no,' and he saw him for a second or so, and he, without any hesitation, said that was the man who was the co-defendant with him, Joseph Tremarco, and there is no taint as to that identification." (A331-332).

The Trial

The People's Case

DOCTOR MARCIAL CERRUTI testified as to the various injuries Harry Bogin received and the medication required as a result of his injuries incurred March 11, 1971 (A373-383). As a result of his wounds, Bogin was in critical condition for several hours and was kept in the intensive care unit for five to seven days (A381).

POINT I

The trial court properly quashed the subpoenas requesting the production of statements made to agents of the Federal Government.

Petitioner contends that his inability to review statements made by Harry Bogin to Agent Collins of the Federal Bureau of Investigation precluded his effective examination of the witness. It must be noted that the Assistant District Attorney prosecuting this case was not allowed to review the F.B.I. files in question (A290, A294). Therefore, in reviewing these reports, neither counsel for the defendant nor counsel for the People were permitted inspection.

Petitioner's counsel subjected Harry Bogin to exhaustive cross-examination. This fact alone does not answer his contention that he has been precluded from effectively cross-examining in the absence of this report. However, we submit, the law is clear that the court below was powerless to compel the production of evidence in the possession of the Department of Justice. In *Jencks v. United States*, 353 U.S. 657, the Supreme Court recognized that pre-trial statements of a prosecution witness are a vital tool for the defense. The decision in *Jencks* became the basis for 18 U.S.C. 3500, the law expressly denominated "the Jencks Act". This act requires that in a federal prosecution, after

[illegible] the witness has testified on direct, the F.B.I. material [illegible] *Brady* [illegible] the production of evidence favorable [illegible] the guilt or [illegible] the case at bar there has been no suppression [illegible] the prosecution sought was not in the [illegible]

a witness has been called by the United States and has given testimony on direct examination, the Court shall, on motion of the defense, order the United States to produce any statement of the witness in the possession of the United States relating to the subject matter of his testimony, for use in cross-examination.

Although the New York State Court of Appeals in *People* v. *Rosario*, 9 N Y 2d 286, expresses the desire that the *Jencks* rule and "Jencks Act" be applicable to state prosecutions wherever feasible, we submit that this stated desire is that and no more. It is not a statement of law.

Although there is a paucity of cases in New York dealing directly with this issue, there are cases in other jurisdictions which lend persuasive support to the People's position that the court below was powerless to order the production of the F.B.I.'s file. In *People* v. *Parham*, 30 Cal. Rptr. 268 (Cal. App. 1963), the Court therein faced a similar situation. The Court noted that the trial court "was powerless to enforce obedience to the subpoena served upon Agent Buchanan. The latter's refusal to comply was based on executive order no. 3229 (revised) of the Attorney General of the United States. . . ." *People* v. *Parham* was vacated on other grounds, by the Supreme Court of California. In a decision by Traynor, J., the court noted, however, that *Jencks* v. *United States*, *supra*, and the "Jencks Act" apply only to Federal prosecutions. 60 Cal. 2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001, 1002-3 (1963), cert. denied 377 U.S. 945 (1964), reh. denied 379 U.S. 873. See also *State* v. *Smith*, 431 S.W. 2d 74, 81 (Mo. 1968); *Sanders* v. *State*, 179 So. 2d 35 (Ala. 1965); *State* v. *Page*, 244 A. 2d 258 (R.I. 1968); *State* v. *Masarenas*, 451 P. 2d 567 (N.M.

1968), reversed on other grounds 458 P. 2d 789; *People* v. *Bellanca*, 173 N.W. 2d 754 (Mich. 1970).*

Faced with a somewhat similar situation to the one at issue here, the New York Court of Appeals affirmed a conviction despite appellant's argument that he was denied access to notes made by Federal agents which notes served as the basis for affidavits supporting the search warrant which produced the evidence used as the basis of the prosecution. The Court examined one of the agents in chambers without defense counsel being present and concluded that the notes contained matters which required confidentiality. The Court also denied a defense motion to examine the agent as to whether the notes could be redacted (*People* v. *Rossi*, 30 N Y 2d 936).

Accordingly, it is submitted that the court below acted properly in quashing petitioner's subpoena directed toward the production of statements in the possession of Agent Collins. It was powerless to do otherwise. There has been no error.

POINT II

The trial court properly concluded that the in-court identification of the petitioner was based upon an independent, untainted source and consequently, was admissible.

We agree with petitioner that the only question in this case is "whether the prosecution established by 'clear and convincing evidence' that the in-court identification, rather

* The validity of executive order number 3229 was upheld in *United States ex rel. Touhey* v. *Ragen*, 340 U.S. 462.

than stemming from the unfair pre-trial showup and photo display, had an 'independent source' " (Petitioner's brief, p. 21). The trial court concluded that despite the unfair pretrial identification procedures, an in-court identification was permissable because the defendant was known to the victim prior to the shooting (A331-332).

We submit that without question, the identification of Joseph Tremarco was based upon the fact that Harry Bogin recognized him immediately as the man known to him as a co-defendant in an unrelated case. Because of the prior familiarity of the two men, this case is completely unrelated to those identity cases where arrests and prosecutions follow show-ups and line-ups in which the victim's only prior confrontation with the defendant is the criminal incident charged. In those cases, an erroneous identification is a distinct possibility and accordingly, is of great concern to the courts. In the case at bar, we submit there is no possibility of a mistaken identification. In *United States ex rel. Phipps* v. *Follette*, 248 F. 2d 912, the Court at page 915 declared that for a court determining whether to allow an in-court identification:

> "The effort must be to determine whether, before the imprint arising from the unlawful identification procedure, there was already a definite image in the witness' mind that he is able to rely on at trial without much, if any, assistance from its successors."

Obviously, where an identification precedes any line-up or show-up and the latter merely confirms the former, it cannot be argued that an in-court identification is based in fact upon the latter. In this regard, the language in *Simmons* v. *United States*, 390 U.S. 377, 384, that photo identification may spare "innocent suspects the ignominy of

arrest by allowing eye witnesses to exonerate them through scrutiny of photographs" becomes quite meaningful. The prosecution of the petitioner in this case proceeded because his *identity was confirmed, not established by the photo display and show-up.*

An in-court identification is allowed despite any tainted pre-trial procedures if the in-court identification is based upon an untainted source independent of the suggestive circumstances of photographs or show-up (*United States* v. *Wade*, 388 U.S. 218, 241; *People* v. *Ballott*, 20 N Y 2d 600, 606; *People* v. *Logan*, 25 N Y 2d 184, 192; *People* v. *Hanley*, 27 N Y 2d 648; *People* v. *Alston*, 27 N Y 2d 822). Independent source was defined by Judge Bergan of the New York Court of Appeals, in his dissent in *People* v. *Rahming*, 26 N Y 2d 411, 425, to mean "nothing other than that the witness is able to make the identification at the trial, drawing on his own memory, not effected by the promptings or suggestions of what he saw at the police show up." In this regard, the trial court found that the petitioner was known to Harry Bogin and that the two had been in one anothers company for at least a half an hour only three months prior to the incident charged. He further concluded that this was not a "casual acquaintance" and that at the time of the assault upon him, Harry Bogin recognized his assailant "without any hesitation and that there is no taint as to that identification" (A331-332). We submit, therefore, that "from the total circumstances the identification by the witness was reliable and had an untainted source independent of the suggestive exhibition or 'show up'" (*People* v. *Oakley*, 28 N Y 2d 311, 312).*

* *People* v. *Oakley* is the only New York case found by this writer in which the identifying witness recognized the defendant as a person known to him by prior course of dealing.

Accordingly, we submit that the evidence clearly and convincingly established beyond any doubt whatsoever that Harry Bogin identified the petitioner in-court as the man he recognized on March 11, 1971.

POINT III

Petitioner was not deprived of a fair trial by comments made in the prosecutor's summation, nor by the brief appearance of a witness whose testimony was stricken from the record.

Petitioner asserts that two statements made by the Assistant District Attorney were so prejudicial that the defendant was denied a fair trial. We respond that the statements in question, although not models of forensic advocacy, are not, when viewed in the context of the trial and balanced with the instructions of the court and its charge, so prejudicial as to deny the petitioner the fair trial to which he is entitled and which, we submit, he received.

The initial statement was "Mr. Gillen only needs one of you—just one—just one juror that says, 'No, Not Guilty, is a victory for Mr. Gillen' " (A 570). Mr. Gillen objected stating "I must respectfully submit that the question of victory for Mr. Gillen means nothing here" (A 570). The Court sustained the objection with the admonishment, "Let's comment upon the evidence and stay within the evidence and those inferences that can be drawn. That's what summation is supposed to be. Nothing else but that" (A 570-571). The jury was properly charged as to the requirement of a unanimous verdict (606-607), and also as to the consideration to be afforded the summation of counsel (604-605). "Our theory of trial relies upon the

arrest by allowing eye witnesses to exonerate them through scrutiny of photographs" becomes quite meaningful. The prosecution of the petitioner in this case proceeded because his *identity was confirmed, not established by the photo display and show-up.*

An in-court identification is allowed despite any tainted pre-trial procedures if the in-court identification is based upon an untainted source independent of the suggestive circumstances of photographs or show-up (*United States* v. *Wade*, 388 U.S. 218, 241; *People* v. *Ballott*, 20 N Y 2d 600, 606; *People* v. *Logan*, 25 N Y 2d 184, 192; *People* v. *Hanley*, 27 N Y 2d 648; *People* v. *Alston*, 27 N Y 2d 822). Independent source was defined by Judge Bergan of the New York Court of Appeals, in his dissent in *People* v. *Rahming*, 26 N Y 2d 411, 425, to mean "nothing other than that the witness is able to make the identification at the trial, drawing on his own memory, not effected by the promptings or suggestions of what he saw at the police show up." In this regard, the trial court found that the petitioner was known to Harry Bogin and that the two had been in one anothers company for at least a half an hour only three months prior to the incident charged. He further concluded that this was not a "casual acquaintance" and that at the time of the assault upon him, Harry Bogin recognized his assailant "without any hesitation and that there is no taint as to that identification" (A331-332). We submit, therefore, that "from the total circumstances the identification by the witness was reliable and had an untainted source independent of the suggestive exhibition or 'show up'" (*People* v. *Oakley*, 28 N Y 2d 311, 312).*

* *People* v. *Oakley* is the only New York case found by this writer in which the identifying witness recognized the defendant as a person known to him by prior course of dealing.

Accordingly, we submit that the evidence clearly and convincingly established beyond any doubt whatsoever that Harry Bogin identified the petitioner in-court as the man he recognized on March 11, 1971.

POINT III

Petitioner was not deprived of a fair trial by comments made in the prosecutor's summation, nor by the brief appearance of a witness whose testimony was stricken from the record.

Petitioner asserts that two statements made by the Assistant District Attorney were so prejudicial that the defendant was denied a fair trial. We respond that the statements in question, although not models of forensic advocacy, are not, when viewed in the context of the trial and balanced with the instructions of the court and its charge, so prejudicial as to deny the petitioner the fair trial to which he is entitled and which, we submit, he received.

The initial statement was "Mr. Gillen only needs one of you—just one—just one juror that says, 'No, Not Guilty, is a victory for Mr. Gillen' " (A 570). Mr. Gillen objected stating "I must respectfully submit that the question of victory for Mr. Gillen means nothing here" (A 570). The Court sustained the objection with the admonishment, "Let's comment upon the evidence and stay within the evidence and those inferences that can be drawn. That's what summation is supposed to be. Nothing else but that" (A 570-571). The jury was properly charged as to the requirement of a unanimous verdict (606-607), and also as to the consideration to be afforded the summation of counsel (604-605). "Our theory of trial relies upon the

ability of the jury to follow instructions" (*Opper* v. *United States*, 348 U.S. 84). We submit therefore that it is simply fanciful to allege that a jury could regard its task in terms of a victory for the attorneys involved.

The second remark was that "the New York police would not have performed such a test (paraffin) because they knew who had committed this crime" (A 571). The jury was promptly admonished to disregard this statement because "that's speculation" (A 571). We submit that when viewed in the context of the testimony and when balanced against the court's instructions, any prejudice which might have emanated from this remark was rendered harmless. Criminal Procedure Law § 470-05 See also *Chapman* v. *California*, 386 U.S. 18: *Harrington* v. *California*, 395 U.S. 250 discussing harmless error of constitutional dimension.

We note initially that the testimony concerning paraffin tests had been elicited by petitioner in his cross-examination of Detective Nacht, inquiring whether a paraffin test had been done (A 529-530). Detective Nacht responded by stating that although there is such a thing as a paraffin test, it is not used by the New York City Police Department.* Thus, the prosecutor was responding in his summation to a false issue injected into the record by the defendant. This is not unlike the situation in *People* v. *Anthony*, 24 N Y 2d 696 where the prosecutor in summation vouched for the "greatness and veracity" of his police witnesses after they had been attacked by defendant's counsel in his closing argument. The Court commented at page 704:

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* Indeed paraffin tests have been found to be inherently unreliable and hence inadmissible in criminal trial. *Brooke* v. *People*, 339 P. 2d 993; *Henson* v. *State*, 159 Tex. Cr. 647.

> "If the issue as to the character and veracity of the police witnesses had a source, it is readily to be found above (in the summation of the defendant's counsel) and any prejudice to defendant Anthony in the prosecution's attempt to offset this doggerel was of defendant's own making".

No standard test had been devised to determine whether or not a remark in summation is proper or improper or whether, if improper it so prejudices a defendant that he is denied a fair trial. Each case involving a charge of prejudice must be scrutinized individually.

The decision in each case as to whether the trial was fair or unfair, whether the error was harmless or prejudicial must of necessity depend upon the nature of the proof adduced and upon the type of error committed, *People* v. *Carborano*, 301 N.Y. 38.

In cases where the proof of the defendant's guilt is clear and convincing, courts have consistently found that a prosecutor's momentary slip of tongue and lack of elegance in advocacy does not constitute reversible error. In *People* v. *Wade*, 23 A.D. 2d 893, the prosecutor characterized the defendant as a "bum" and also indulged in "unwarranted criticism of defense counsel's conduct of the trial." Nevertheless the court held that the proof of defendant's guilt was clear and convincing and under all the circumstances disclosed by this record we find that such improprieties were not material; they did not affect the result or deprive defendant of a fair trial." See also *People* v. *Wollmer*, 274 A.D. 1011.

The New York Court of Appeals has just recently affirmed a conviction for possession of gambling records and

promoting gambling, despite reference in summation to organized crime, the effect of gambling operations on the poor and disadvantaged and the amount of money allegedly made by the defendant in gambling activities. *People* v. *DiPaolo* 30 N.Y. 2d 962.

In *People* v. *Ruberto*, 13 A.D. 2d 944, the prosecutor stated in effect that he himself believed what he was asking the jury to believe and that "we know the defendant was in on this." The court held "we believe the proof of guilt to be palpable and that under § 542 of the Code of Criminal Procedure* the prosecutor's improper remarks in this summation—we find only two such remarks—do not preclude affirmance."

The remarks of the prosecution in the case at bar cannot be equated with the prejudice found in *People* v. *Lombard*, 4 A.D. 2d 666 and *People* v. *Tanzella*, 300 N.Y. 425, relied upon by appellant. In *Lombard*, *supra* the conviction was reversed because a confession of a co-defendant was admitted against Lombard, and the court ruled that "[i]n view of the limited character of the evidence of DeGennaro's confession, the safeguards which the law throws about its use against Lombard were completely dissipated by the arguments which the District Attorney advanced in his summation with reference to the contents of the confession and DeGennaro's admission." The case against DeGennaro was established by his own admission at trial. The prosecutor in summation repeatedly referred to the confession and admissions of the obviously guilty co-defendant which implicated Lombard. This the Court of Appeals found to be prejudicial error.

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* Now Criminal Procedure Law § 470.05 [1].